(3)

No. 05-21

Supreme Court, U.S.
FILED
SEP 21 2005
OFFICE OF THE CLERK

OCT 7 PAGE 1

In the Supreme Court of the United States

USX CORPORATION;
U.S. STEEL MINING COMPANY, INC.
Petitioners,

v.

JOANNE B. BARNHART,
Commissioner of Social Security,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID J. LAURENT
Counsel of Record
STEPHEN L. KORBEL
BABST, CALLAND, CLEMENTS AND ZOMNIR, P.C.
TWO GATEWAY CENTER
8TH FLOOR
PITTSBURGH, PA 15222
(412) 394-6440

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TABLE OF CONTENTS

ARGUMENT 1

A. SSA's Brief in Opposition does not undermine and in fact corroborates the existence of a split in the circuit courts regarding the proper interpretation of Rule 15(a) and *Foman* 1

B. The Third Circuit's decision works a grave injustice, contrary to the letter and spirit of Rule 15(a) 3

CONCLUSION 5

TABLE OF CITED AUTHORITIES

Cases:

Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.,
156 F.3d 49 (1st Cir. 1998) 2-3

Aloe Energy Corporation v. Apfel,
No. 99- 3915 (3d Cir., June 20, 2000) 4

Chaudhry v. Gallerizzo,
174 F.3d 394 (4th Cir. 1999) 2, 3

Foman v. Davis,
371 U.S. 178 (1962) 1

Frank v. U.S. West,
3 F. 3d 1357 (10th Cir. 1993) 3

Harrison v. Rubin,
174 F.3d 249 (D.C. Cir. 1999) 3

Roberson v. Hayti Police Department,
241 F. 3d 992 (8th Cir. 2001) 2, 3

Sigmon Coal Co. v. Barnhart,
534 U.S. 438 (2002) 4

Smith v. EMC Corp.,
393 F.3d 590 (5th Cir. 2004) 3

Smith v. Duff & Phelps, Inc.,
5 F.3d 488 (11th Cir. 1993) 2

ARGUMENT

A. SSA's Brief in Opposition does not undermine and in fact corroborates the existence of a split in the circuit courts regarding the proper interpretation of Rule 15(a) and *Foman*.

SSA mischaracterizes the issue as whether a court can deny leave to amend on the basis of undue delay. USS does not dispute that a court can deny leave to amend under Rule 15(a) and *Foman v. Davis*, 371 U.S. 227 (1962) for undue delay; however, there are considerable differences among the circuit courts regarding what constitutes undue delay.

USS' Petition presents the question of whether the delay must be accompanied by prejudice to the opposing party, burden on the court, or bad faith to be considered undue. The answer to that question presently differs from circuit court to circuit court, as illustrated by the cases USS cited on pages 9 – 11 of its Petition.

SSA mistakenly claims that the circuits are consistent because they uniformly hold that substantial delay, in conjunction with any number of other factors, amounts to undue delay. Brief at 5. The point of USS' Petition, however, is that the circuit courts differ materially on exactly what other factors must be present to establish undue delay, with the majority holding that the delay must be accompanied by prejudice, burden on the court, or bad faith to be considered undue, and the minority holding that the movant's failure to explain the delay to the court's satisfaction, or the mere existence of prior opportunities to amend, is enough to make the delay undue.

With the issue properly framed, several of the cases SSA cited in its Brief actually demonstrate the presence of this split among the circuits. For example, in *Chaudhry v. Gallerizzo*, 174 F.3d 394, 404 (4th Cir.1999), the Court observed "that 'a motion to amend may be denied when it has been unduly delayed and when allowing the motion would prejudice the non-movant.'" (Emphasis added.) The *Chaudhry* court went on to deny the proposed amendment because plaintiffs filed it two weeks before trial and granting the motion "would have improperly allowed Plaintiffs to alter their case to the unfair prejudice of Galleizzo." *Id.*

Similarly, in *Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 493-494 (11th Cir. 1993), the Court upheld the denial of a proposed amendment because "[t]o allow a new cause of action at this late date would be prejudicial."

Likewise, in *Roberson v. Hayti Police Department*, 241 F. 3d 992 (8th Cir. 2001), the Circuit Court reversed the district court's denial of leave to amend because the proposed delay would not have prejudiced the opposing party. The Circuit Court observed that to deny leave to amend, "the delay must have resulted in unfair prejudice to the party opposing amendment." *Id.* at 995.

Accordingly, *Chaudhry, Smith,* and *Roberson* illustrate the majority rule that to deny an amendment on the basis of undue delay, the delay must be accompanied by prejudice, burden on the court, or bad faith.

SSA also cited three cases for the proposition that leave to amend can be denied on the basis of undue delay where the movant failed to adequately explain the delay or had prior opportunities to assert the proposed amendment and failed to do so. *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156

F.3d 49 (1st Cir. 1998); *Smith v. EMC Corp.*, 393 F.3d 590 (5th Cir. 2004); and *Frank v. U.S. West,* 3 F.3d 1357 (10th Cir. 1993). These cases are clearly inconsistent with *Chaudhry, Smith*, and *Roberson* and reflect the minority rule that undue delay may be found in the absence of prejudice, burden on the court, or bad faith.[1]

Accordingly, with the issue properly framed as what factors must accompany the delay to make it undue, the split among the circuit courts is clear.

B. The Third Circuit's decision works a grave injustice, contrary to the letter and spirit of Rule 15(a).

SSA claims that the Third Circuit correctly upheld the denial of USS' motion for leave to amend because USS had earlier opportunities to amend and the interests of judicial

---

[1] SSA also cited *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999) for the proposition that a court can deny leave to amend for undue delay when the movant seeks to add new factual allegations. Once again, however, this case does not undermine USS' contention that a split among the circuit courts exists. In *Harrison*, the court stated that "[a]lthough this Circuit has recognized undue delay as a basis for denying a motion to amend, we have done so only where plaintiffs sought to add new factual allegations. [Citation omitted.] Where an amendment would do no more than clarify legal theories or make technical corrections, we have consistently held that delay, without a showing of prejudice, is not a sufficient ground for denying the motion." 174 F.3d at 254. Thus, *Harrison* essentially holds that leave to amend can be denied where plaintiff delayed adding new factual allegations, possibly even if the delay did not prejudice the opposing party, but in other circumstances, the delay must be accompanied by prejudice to be considered undue. Therefore, the D.C. Circuit appears to use a hybrid approach that is a blend of the majority and minority rules.

economy and finality would have been undermined by allowing USS to amend after summary judgment already had been granted. Brief at 7. SSA is wrong on both points.

First, the district court rescinded the original grant of summary judgment in light of this Court's decision in *Sigmon Coal Co. v. Barnhart,* 534 U.S. 438 (2002), and the Magistrate Judge did not issue a new report and recommendation sustaining USS' successorship claims until over six months after she denied USS' motion for leave to amend. Moreover, the Magistrate Judge did not issue her report and recommendation on the other remaining counts in the complaint until over a year after she denied USS' motion for leave to amend. Under these circumstances, judicial economy and finality considerations militated strongly in favor of granting USS leave to amend and resolving USS' claims on the merits.

Second, in the absence of a finding of bad faith, burden on the court, or prejudice to SSA, the fact that USS arguably could have moved to amend sooner hardly justified the denial of USS' motion for leave to amend.[2] Indeed, penalizing USS for not having moved sooner under these circumstances did not vindicate any of the policies supporting Rule 15(a) and, instead, simply generated a windfall for SSA. This result is the antithesis of the letter and spirit of Rule 15(a).

---

[2] This is particularly true given that it would have been futile for USS to have moved for leave to amend before this Court issued the decision in *Sigmon* since the Third Circuit already had ruled in favor of SSA on the successorship issue. *Aloe Energy Corporation v. Apfel,* No. 99-3915 (3d Cir., June 20, 2000).

CONCLUSION

The Court should grant USS' Petition to resolve the split in the circuit courts over what constitutes undue delay.

Respectfully submitted,

David J. Laurent
Counsel of Record
Stephen L. Korbel
BABST, CALLAND,
CLEMENTS and ZOMNIR, P.C.
Two Gateway Center
Eighth Floor
Pittsburgh, PA 15222
(412) 394-6440

Counsel for Petitioners